No. 93-1262

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

DONNA TIEMEYER; THOMAS TIEMEYER; GEOFFREY TIEMEYER, by Donna Tiemeyer, his mother and next friend; ZACHARY TIEMEYER, by Donna Tiemeyer, his mother and next friend; JOSHUA TIEMEYER, by Donna Tiemeyer, his mother and next friend,

v. *Petitioners,*

COMMUNITY MUTUAL INSURANCE COMPANY; CHILDREN'S HOSPITAL MEDICAL CENTER; THE CHILDREN'S HOSPITAL MEDICAL CENTER BLUE CROSS, BLUE SHIELD, AND MAJOR MEDICAL PLAN FOR REGULAR FULL-TIME AND PART-TIME EMPLOYEES,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD G. MARKS
BECKMAN, WEIL, SHEPARDSON & FALLER
1200 Mercantile Center
120 East Fourth Street
Cincinnati, Ohio 45202
513-621-2100

Counsel of Record for Respondent Community Mutual Insurance Company

FRANK C. WOODSIDE, III
COUNSEL OF RECORD
JOHN E. SCHLOSSER
FREDERICK M. ERNY
DINSMORE & SHOHL
1900 Chemed Center
255 East Fifth Street
Cincinnati, Ohio 45202
513-977-8200

Counsel for Respondents Children's Hospital Medical Center and The Children's Hospital Medical Center Blue Cross, Blue Shield, and Major Medical Plan for Regular Full-Time and Part-Time Employees

March 4, 1994

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CORPORATE AFFILIATIONS OF RESPONDENTS

Respondents CHILDREN'S HOSPITAL MEDICAL CENTER, THE CHILDREN'S HOSPITAL MEDICAL CENTER BLUE CROSS, BLUE SHIELD, AND MAJOR MEDICAL PLAN FOR REGULAR FULL-TIME AND PART-TIME EMPLOYEES and COMMUNITY MUTUAL INSURANCE COMPANY are not affiliated with any corporations.

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OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the district court (Pet.App. 1a) is reported at 789 F.Supp. 894 (S.D.Ohio 1992). The opinion of the court of appeals (Pet. App. 22a) is reported at 8 F.3d 1094 (6th Cir. 1993).

COUNTER-STATEMENT OF THE CASE

On October 13, 1987, Petitioner, Donna Tiemeyer, who was an employee of Respondent Children's Hospital Medical Center ("CHMC"), learned that triplets were expected to be born early the following year and might become available for adoption. (JA 145, 391).[1] As an employee of CHMC, Mrs. Tiemeyer was entitled to certain health insurance benefits under The Children's Hospital Medical Center Blue Cross, Blue Shield, and Major Medical Plan for Regular Full-Time and Part-Time Employees ("Plan"). On that same day, well before initiating adoption proceedings, Mrs. Tiemeyer contacted Mary Gavin, an employee of CHMC's Human Resources Department, to discuss the availability of health insurance coverage for such yet-to-be-born infants. (JA 391). During this initial conversation, Mrs. Gavin described and explained to Mrs. Tiemeyer the Plan's rule regarding coverage for adopted children – i.e., that the effective date of coverage would be the latter of (1) the date of the filing of a Petition for Adoption or (2) the date when the children became residents in the home of the subscriber.

[1] Citations to JA refer to the Joint Appendix filed in the Sixth Circuit.

(JA 702-704). They also discussed the fact that there was a question as to the effective date of the sought after coverage. (JA 798-799). Understandably, Mrs. Tiemeyer became concerned about coverage for the yet-to-be-born children. (JA 799).

Thereafter, upon rechecking the rule regarding the inception of coverage for adopted children, Mary Gavin contacted Donna Tiemeyer and again explained the rule to her. She specifically read to Mrs. Tiemeyer the rule regarding eligibility for adopted children from the Plan's Administrative Manual. (JA 705, 812). The rule stated:

> In the case of child adoption, if the application is received:
>
> - within 30 days of the adoption, the adoption date becomes [the] effective date of the coverage. The adoption date is the date the child establishes residence with the subscriber or the date the petition for adoption is filed, whichever occurs last. (JA 235).

Over the next two months, there were several additional telephone conversations between Donna Tiemeyer and Mary Gavin regarding the rule and the question of health insurance coverage for the triplets. (JA 799, 811).

On December 29, 1987, the triplets were prematurely born. (JA 10, 12). On January 4, 1988, the Tiemeyers' adoption attorney, Mr. Garretson, became involved in the discussions. (JA 707-708). On that day, he called the CHMC Human Resources Department and indicated he would not accept the coverage rule outlined to Donna Tiemeyer on numerous previous occasions, that he knew ways around the Plan rule regarding the effective date of

coverage for adopted children, and said that he wanted to speak to an attorney at Community Mutual Insurance Company ("CMIC")[2] about this matter. (JA 372).

Following this conversation, Mrs. Tiemeyer called Mary Gavin to discuss the prospect of adopting the triplets, who were still hospitalized. (JA 708). Mary Gavin again cautioned her about the financial responsibility she was facing, and Mrs. Tiemeyer told Mary Gavin that they were working on other possibilities for payment. (JA 708).

On or about January 14, 1988, Mr. Garretson spoke with a member of CMIC's legal department regarding coverage. Mr. Garretson was again advised of CMIC's position regarding when coverage would become effective and what would be payable under the policy. (JA 372-373). Mr. Garretson was told that the legal department would review the Plan documents and he would then be advised of the findings regarding coverage for the triplets.

On January 15, 1988, despite the fact that there was still a question as to coverage, the Tiemeyers filed a Petition for Adoption in the Probate Division of the Hamilton County Court of Common Pleas. (JA 374, 392). A few hours later, the Tiemeyers went to CHMC's Human

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[2] For the benefit of its eligible employees, CHMC has for many years provided an employee health care benefit program. For the Plan at issue here, CHMC entered into a group contract with CMIC to provide Blue Cross, Blue Shield and Major Medical benefits for certain CHMC employees and eligible members of their family. (JA 367). CMIC was the designated agent of the Plan Administrator, CHMC. (JA 413).

Resources Department and filled out an application for coverage. (JA 374). Once again, the Administrative Manual rule regarding the effective date of health insurance coverage was read to Mrs. Tiemeyer. (JA 374). She then formally applied for coverage for the infants.

After reviewing the Plan documents, the CMIC attorney advised Mr. Garretson by letter dated January 19, 1988, that coverage was not effective because the Plan rule which outlined the effective date of coverage for adopted children had not been satisfied. (JA 432-433). Accordingly, the infants were not eligible for coverage until the residency requirement was satisfied.[3]

Petitioners administratively appealed the denial of coverage for the period prior to the discharge of the infants from the hospital. (JA 584-585). This appeal was denied. (JA 586).

Cincinnati's University Hospital, where the infants were born and treated, commenced suit against the Tiemeyers in the Hamilton County Court of Common Pleas on December 15, 1989, seeking all hospital and related medical expenses incurred from their birth on December 29, 1987 to the children's discharge dates. (Pet. App. 24a-25a).[4] On July 6, 1990, the Tiemeyers filed this action

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[3] Upon being discharged from the hospital in March, April and May of 1988, each of the boys was accepted for coverage under the Plan and all subsequent medical bills were paid. (JA 393).

[4] Contrary to Petitioners' Statement of Facts (Pet. at p. 6), the recovery sought in that suit was not limited to those expenses incurred from the date the Petition for Adoption was filed (January 15, 1988). (JA 104-108).

in the district court, seeking damages from CMIC and CHMC for alleged breach of contract, violation of ERISA and violation of plaintiffs' civil rights. (JA 8). The First Amended Complaint, adding the Plan as a defendant, was filed February 12, 1991. (JA 58). Upon Respondents' motions, Counts I (Breach of Contract) and III (Violation of Civil Rights) were dismissed by court order on April 23, 1991. (JA 143). After discovery, the parties filed simultaneous cross-motions for summary judgment.

In the district court, Petitioners noted that: "ERISA specifically allows an award of attorneys' fees, expenses and costs to the prevailing party in an action brought by a participant, beneficiary or fiduciary of an employee benefit plan." 29 U.S.C. § 1132(g)(1). (JA 162). Thereafter, the Petitioners invoked Sixth Circuit authority for their claim for attorneys' fees:

> The factors to be considered in making such an award are set forth in *Secretary of Dept. of Labor v. King*, 775 F.2d 666 (6th Cir. 1985):
>
> 1. Degree of opponent's culpability or bad faith;
>
> 2. Ability of the opposing party to satisfy the fee award;
>
> 3. Deterrent influence on others;
>
> 4. Whether the party requesting fees sought to benefit all participants in a multi-employer plan or to resolve a significant legal question;
>
> 5. The relative merits of the party's positions.

(JA 162-163). The Petitioners went on to argue that " . . . the arbitrary and unreasonable denial of benefits to only adopted children who are hospitalized is an act of

bad faith and merits a finding of culpable behavior." (JA 163).

At no point in the district court did Petitioners argue (1) that any presumption was or ought to be operative in favor of an award of attorneys fees to a prevailing plaintiff, or that (2) the Defendant plan administrator ought to bear the burden of showing "unusual circumstances" to avoid the automatic imposition of an attorney fee award. In opposing Petitioners' Motion for Summary Judgment, Respondent CMIC argued against the award of attorneys' fees. (JA 600-603). Respondents CHMC and the Plan adopted those portions of CMIC's memorandum by reference.[5]

On April 16, 1992, the district court granted Petitioners' Motion for Summary Judgment with regard to liability. In denying the application for attorneys' fees, the district court relied upon a case cited by Respondents, i.e., *Armistead v. Vernitron Corp.*, 944 F.2d 1287, (6th Cir. 1991), but also on one cited by the Petitioners, *Secretary of Dept. of Labor v. King*, 775 F.2d 666 (6th Cir. 1987). (Pet. App. 17a). The court "carefully examined the facts presented by both sides," in denying Petitioners' request for attorney fees. (Pet. App. 38a). Moreover, the district court specifically rejected Petitioners' proffered factual claim that the Respondents had acted in bad faith. (*Id.*) The

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[5] *See*, Memorandum of Defendants Children's Hospital Medical Center and The Children's Hospital Medical Center Blue Cross, Blue Shield and Major Medical Plan for Regular Full-Time and Part-Time Employees in Opposition to Plaintiffs' Motion for Summary Judgment at p. 2, n.1 (filed November 18, 1991).

District Court did not address (presumably, because the issues were not raised): 1) which party would rightly bear the burden of proof on the attorneys' fee issue or; 2) whether any presumption regarding the claim for attorneys' fees was applicable. Though the district court denied the requests for attorneys' fees, Petitioners did not seek reconsideration of that ruling or argue to that court that an evidentiary hearing as to the entitlement to attorneys' fees and/or the amount was necessary or even desired. "Upon consideration of the record," the district court denied Petitioners' request for prejudgment interest. (Pet. App. 18a, 39a).

The Petitioners appealed the denial of prejudgment interest and attorneys' fees to the United States Court of Appeals for the Sixth Circuit. (JA 659). Respondents cross-appealed from the judgment that there was coverage in favor of the triplets from the time the Petition for Adoption was filed (and even before the children had first entered Petitioners' home). (JA 661, 663).

On appeal, the statement of issues set forth by the Petitioners in their opening brief in the Sixth Circuit made no mention of the issue now posed by the instant Petition. In fact, Petitioners merely argued that the district court had abused its discretion in denying attorneys' fees "where the legal standards set by [the Sixth Circuit] Court were misapplied."[6]

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[6] *See*, Brief for the Plaintiffs-Appellants, Cross Appellees (filed October 1, 1992), at p. 3 (hereinafter "Petitioners Opening Brief").

Petitioners' argument in their opening appellate brief closely tracked that which they made in the district court. Petitioners did *not* contend that the precedents of the Sixth Circuit on the attorneys' fees issue were erroneous or outmoded, or should, in light of inconsistent precedents in other circuits, be changed. Rather, Petitioners argued that the District Court had *failed to follow* the precedents *of the Sixth Circuit*. No suggestion was made that a change of law was necessary if Petitioners were to prevail on the attorneys' fees issue. Once again, Petitioners relied upon *Armistead, supra, Secretary v. King, supra,* and the latter case's adoption of the five factors set forth in *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978).

Petitioners also did not contend that any presumption was available to Plaintiffs in ERISA cases, or that a burden of dissuasion on a claim for attorneys' fees should rest on Defendants. Indeed, Petitioners' argument in the Sixth Circuit with respect to *Armistead* suggests the opposite:

> *Armistead*'s holding that fee awards *should not be granted as a matter of course to prevailing parties, id.* at 1302, reinforces this obligation to scrutinize the facts of a particular case to determine whether this is one of the instances in which the remedial purpose of the statute cannot be achieved without an award. The award is discretionary precisely because there *are* situations in which they are not warranted. . . .[7]

(Petitioners' Opening Brief, at p. 9, italics added.)

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[7] While Petitioners mentioned in a footnote that there was, in effect, a presumption in favor of fee awards in the Seventh, Eighth and Ninth Circuits (*id.* p. 13), they did not contend that the Sixth Circuit should abandon *Armistead* and *King* in favor of such a presumption.

Petitioners sought from the Sixth Court no mandate that an evidentiary hearing be held in the district court to determine whether attorneys' fees should be recovered. Rather, Petitioners requested a judgment from the Court of Appeals, based on the existing record, that attorneys' fees *were* recoverable. Petitioners sought a remand only for the purpose of determining *the amount of* those recoveries. (*Id.*, p. 25).

Respondents filed a collective opening brief in the Sixth Circuit. In arguing the attorneys' fees issue, *Respondents*, for the first time, addressed the question of who bore the burden of proof on attorneys' fees, and placed that burden *on the Petitioners*. Respondents stated:

> In the Sixth Circuit, a claimant must prove, pursuant to the 5-point *King* test, that a substantial basis exists for the award of attorney fees, and the plaintiffs herein failed to present such proof.[8]

In their second and final brief in the Court of Appeals,[9] Petitioners *did not dispute* Respondents' contention that they, the Plaintiffs, properly bore the burden of proof on the issue of attorneys' fees. Neither did Petitioners argue that the burden of proof on the attorneys' fees issue should rest on Respondents. Perhaps because it

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[8] "Brief of Defendants-Appellees, Cross Appellants, Community Mutual Insurance Company, Children's Hospital Medical Center, and the Children's Hospital Medical Center Blue Cross, Blue Shield, and Major Medical Plan for Regular Full-Time and Part-Time Employees" (filed November 3, 1992) at p. 27 (hereinafter "Respondents Opening Brief").

[9] "Brief and Reply Brief for the Plaintiffs-Appellants, Cross Appellees," (filed December 7, 1992).

was then unknown which of the parties would, ultimately, prevail on the coverage issue, Petitioners made *no argument* for a presumption in favor of a fee award to a prevailing party, or for shifting the burden of proof on attorneys' fees to the unsuccessful litigant of the coverage question.[10]

The Sixth Circuit upheld liability, (Pet. App. 37a), but also affirmed the denial of an award of attorney fees, determining, *inter alia*, that the district court "carefully examined the facts presented by both sides" and that Petitioners "failed to demonstrate that the district court abused its discretion by denying [Petitioners'] request for attorney fees. (Pet. App. 38a-39a).

Although Respondents might otherwise have filed herewith a cross-petition for certiorari under Rule 12.3, of the Rules of the Supreme Court of the United States, any further appeals on the coverage issue have since become moot. Respondents, following the Sixth Circuit's affirmance of the coverage decision, reached a settlement with the health care providers. Apart from its mention here and in the Petition (Pet. at p. 11), this settlement is not a matter of record in this case.[11] It resulted, however, in the dismissal with prejudice of the collection action by University Hospital against the Tiemeyers. That action sought to collect from Petitioners the entire hospital bill,

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[10] Rather, Petitioners stated "[p]laintiffs do *not* argue that a successful ERISA claimant should always be an [sic] awarded attorneys fees . . . ." *Id.*, at 18.

[11] The "normal contingent fee agreement" mentioned by Petitioners (Pet. at p. 24, n.11) is also not a matter of record in this case.

not just the part incurred after the petition for adoption was filed. The settlement thereby resulted in the release and discharge of the entire claimed indebtedness, including that which the Petitioners might owe to the hospital for the period of time before – even in the Petitioners' contention – coverage had attached to the triplets. This is mentioned, though it is not a matter of record, because Respondents dispute Petitioners' contention that they achieved no net gain from their pressing of the coverage suit. In fact, substantial expenses for the care of the children – expenses incurred before (in any court's judgment) the coverage on the triplets attached, were wiped out by the settlement. As a result, a portion of their alleged indebtedness, which Petitioners never contended to be insured, was discharged as a result of their prevailing on the coverage case.

Thereafter, this Petition was filed, addressed solely to the attorney's fees issue.

SUMMARY OF REASONS FOR DENYING THE WRIT

Petitioners relied upon the law of the Sixth Circuit in arguing to the lower courts and failed to point out the alleged conflict in the circuits. They never argued for a change in Sixth Circuit common law to harmonize its law with that of other circuits. Therefore, the issue upon which their Petition is based, was neither advanced nor preserved.

Now, for the first time, Petitioners contend they should have enjoyed a rebuttable presumption favoring an award of attorneys' fees. However, application of the

presumption to the facts of this case would not change the results. Accordingly, this case presents no opportunity to resolve the putative conflict among the circuits.

REASONS FOR DENYING THE WRIT

I. PETITIONERS HAVE FAILED TO RAISE IN THE LOWER COURTS THE ISSUE WHICH THEY NOW PRESENT.

A. Whatever Differences May Exist In The Precedents Of The Federal Circuits Concerning Awards Of Attorneys' Fees Under 29 U.S.C. § 1132(g)(1), The Petitioners Urged The District Court And The Court Of Appeals To Apply Sixth Circuit Precedent Rather Than To Change The Law Of The Sixth Circuit In Order To Reconcile It With The Law In Another Circuit.

Rule 10.1(a), of the Rules of the Supreme Court of the United States, indicates that this Court may consider a grant of certiorari "when a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter . . . " This provision is, Respondents urge, subject to the implied proviso that the petitioner asked the court of appeals to apply a different rule of law than the one which that court chose to apply. Here, Petitioners apparently found the existing precedents in the Sixth Circuit (as a matter of foresight) sufficient for their purpose until after the Sixth Circuit declined to interpret the facts favorably to them. Their position has always been that, under the Sixth Circuit precedents, properly applied, they would prevail on the attorneys' fees question. Petitioners

never urged the Sixth Circuit to change the law, and never relied upon any contended conflict with another circuit as a basis for such a change.

Thus, the Petition for Certiorari asks a ruling from this Court which the Petitioners never sought from the court of appeals or from the district court. To grant certiorari would not be to undertake *review* of any legal decision which the courts below made *in this case*. A grant of certiorari would result in a "review" of the legal reasoning of the Sixth Circuit in *Secretary of Labor v. King*, 775 F.2d 666 (6th Cir. 1985) and *Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991) as well as a revisiting of the decisions from all other circuits in which the litigants timely raised the legal question which the Petitioners belatedly broach here. Thus, the Petition should be denied.

B. Petitioners For Certiorari May Not Argue To The Supreme Court A Proposition Of Law Different From Or Inconsistent With Their Legal Position In The Court Of Appeals.

The fact that Petitioners preserved in the record a claim of error in the district court's denial of attorneys' fees and the court of appeals' affirmance of that denial does not entitle Petitioners, for the sake of invoking this Court's jurisdiction, to now pose a new legal question never put to either court below. In this case, the Sixth Circuit merely applied its own precedent *as the parties agreed should be done*. The Sixth Circuit was not called upon to weigh the competing factors militating for and against the *Eaves* test or any of the other variations from

the Circuits governing attorneys' fees in ERISA claims. This case has produced no record and no opinion from any court on this subject. In such a situation, the normal practice of this Court is to refuse to entertain arguments on such newfound formulations of law. *United States v. Ortiz*, 422 U.S. 891, 898 (1974), *Federal Trade Commission v. Grolier, Inc.*, 462 U.S. 19, 23, n.6 (1983). Even if Petitioners had raised the instant issue in the district court, their failure to assert it in the court of appeals would normally lead this Court to decline review. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 244-45 *reh. denied*, 471 U.S. 1062 (1985). There is no reason to depart from this well-established standard.

II. THIS CASE PRESENTS A POOR VEHICLE FOR RESOLVING ANY CONFLICT WHICH MAY EXIST IN THE CIRCUIT COURTS.

Virtually every circuit recognizes that the decision whether to award attorneys fees under § 1132(g)(1) is committed to the discretion of the Court.[12] Only the

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[12] *See Gray v. New England Tel. and Tel. Co.*, 792 F.2d 251, 259 (1st Cir. 1986) ("We note first that in this circuit an award of attorney's fees under ERISA . . . remains discretionary with the trial judge."); *Chambless v. Masters, Mates and Pilots Pension Plan*, 815 F.2d 869, 871 (2nd Cir. 1987) ("The decision of whether to award fees lies within the discretion of the district court"); *Ellison v. Shenango Inc. Pension Board*, 956 F.2d 1268, 1273 (3rd Cir. 1992) ("Under section 502(g)(1) we review a district court's award or denial of attorneys fees for abuse and discretion".); *Quesinberry v. Life Ins. Co. of North America*, 987 F.2d 1017, 1028 (4th Cir. 1993); ("Thus, ERISA places the determination of whether attorneys' fees should be awarded in an ERISA action

Eighth and Ninth Circuits have created a rebuttable presumption to aid the district courts in exercising their discretion.[13] Nevertheless, both of these circuits still apply the 5 factor test announced in *Eaves*, in conjunction with the presumption. *See, Lawrence v. Westerhaus*, 749

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completely within the discretion of the district court."); *Iron Workers Local No. 272 v. Bowen*, 624 F.2d 1255, 1264 (5th Cir. 1980) ("[S]ection 502(g) on its face gives the district court discretion with regard to attorneys' fees . . . ."); *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1303 (6th cir. 1991) ("The wording of the statute [1132(g)(1)] itself provides the courts with almost unbridled discretion."); *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 828 (7th Cir. 1984) ("[S]ection 1132(g)(1) . . . commits to the district judge's discretion the question [of] whether to award fees in a particular case."); *Landro v. Glendenning Motorways Inc.*, 625 F.2d 1344, 1356 (8th Cir. 1980) ("Since 29 U.S.C. § 1132(g) clearly commits the question of allowance of attorney's fees in suits under § 1132 to the discretion of the district court . . .); *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 589 (9th Cir. 1984) ("ERISA provides that 'the court in its discretion may allow a reasonable attorney's fee' . . . "); *Eaves v. Penn*, 587 F.2d 453, 464-65 (10th Cir. 1978) ("[T]he court, in its discretion, may allow reasonable attorneys fees to *either* party . . . ") (emphasis in original); *Harrison v. UMWA 1974 Benefit Plan & Trust*, 941 F.2d 1190, 1193 (11th Cir. 1991) ("Under 29 U.S.C. § 1132(g)(1), a district court may allow at its discretion a reasonable attorneys's fee to either party in a lawsuit brought under ERISA.").

[13] Petitioners correctly state that the Seventh Circuit employs a "modest presumption" in favor of an award of attorneys' fees to a prevailing party. (Pet. at 14-16), *citing Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820 (7th Cir. 1984). However, the Seventh Circuit has stated "that the difference between the two tests [*Bittner's* modest presumption and the 5 factor test originally propounded in *Eaves*] was insubstantial." *Local 504 v. Roadmaster Corp.*, 954 F.2d 1397, 1405 (7th Cir. 1992).

F.2d 494, 495 (8th Cir. 1984);[14] *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980) (adopting *Eaves*).[15] Even Petitioners do not argue for a conclusive or non-rebuttable presumption in favor of a fee award to a successful claimant.[16] Petitioners perhaps realize that this would nullify the permissive, discretionary authority for fee awards in 29 U.S.C. § 1132(g)(1). It would judicially amend the statute, at least as to prevailing beneficiaries, from its present wording: ". . . the Court in its discretion may allow . . ." to "the Court *without* discretion *must* allow . . ."

In the case at bar, the district court "carefully examined the facts" as to the attorney's fees issue. (Pet. App.

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[14] *See also Daster v. E.F. Hutton*, 698 F.Supp. 172, 175 (D.Minn. 1988) ("When considering an application for attorneys' fees, the Eighth Circuit has indicated that a court should consider the following factors [listing the 5 factors]."); *Houghton v. Sipco, Inc.*, 828 F.Supp. 631, 640 (S.D.Iowa 1993) ("in considering plaintiffs' claims for attorneys fees under ERISA, district courts apply a five factor standard . . . .").

[15] *Hummell* has not been overruled. *See also, Franklin v. Thornton*, 983 F.2d 939, 943 (9th Cir. 1993) ("In *Hummell*, this court set out the five factors to be considered in deciding whether an award of attorney's fees is proper in an ERISA case."). Interestingly, the Ninth Circuit in *Franklin* determined that it was an abuse of discretion for the district court to merely conclude that attorneys fees are awarded as a matter of course without weighing the *Hummell* factors. *Id.*

[16] Although not available to Petitioner at the time of the filing of the Petition, *Fogarty v. Fantasy, Inc.*, ___ U.S. ___, ___ S.Ct. ___, 1994 W.L. 57023 (March 1, 1994), precludes such an argument. ("The word 'may' clearly connotes discretion. The automatic awarding of attorneys fees to the prevailing party would p:etermit the exercise of that discretion."). *Id.*, at *6.

38a). After utilizing the 5 factors from *Eaves* (and adopted by the Sixth Circuit in *Secretary of Department of Labor v. King*, 775 F.2d 666, 669 (6th Cir. 1985)), the district court concluded that

(1) "Defendants did not proceed in bad faith" (*Eaves* factor No. 1);

(2) "Defendants, no doubt, could satisfy an award of attorneys fees" (*Eaves* factor No. 2);

(3) "Subsequent changes to Ohio law mute the deterrent effect of such an award" (*Eaves* factor No. 3);

(4) the subsequent change in law "constrain[ed] the plaintiffs from conferring a common benefit" (*Eaves* factor No. 4) and;

(5) Defendants "advanced [a] meritorious position[]" (*Eaves* factor No. 5).

(Pet. App. 17a-18a). Thus, four of the five *Eaves* factors counseled *against* an award of attorneys' fees here.[17]

Even if the presumption espoused by the Eighth and Ninth circuits (and Petitioners, *see* Pet. at p. 29) were applied here, this case would not warrant an award of fees because there was a legitimate dispute and Respondents were justified in pressing a reasonable, meritorious, but ultimately unsuccessful defense.[18] In cases so close and difficult as this, where both sides have ample justification to litigate, it seems

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[17] Because factors No. 1 and 5 were decided in Respondents' favor, Petitioners' comment in footnote 10, regarding state law bad faith and punitive damages, is perplexing.

[18] The issue of whether the Plan had discretionary authority was "a close question here." (Pet. App. 42a) (Kennedy, J. concurring).

unfair, unjust and harsh to saddle one side with the fees of both.

If the presumption would somehow change the outcome, the result would effectively rewrite § 1132(g)(1). In other words, a conclusion that fees were warranted here would mean that an award of fees is *always* justified as long as the losing party could satisfy such an award (a not uncommon occurrence in ERISA benefits cases).

Such a result transforms § 1132(g)(1), a discretionary statute, into a mandatory fee shifting statute – a result that Congress did not intend.[19] For this reason, the Petition should be denied.

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[19] In *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975), this Court, while referring to the desirability of an award of fees in a variety of circumstances, ruled that only Congress, and not the Judiciary, could specify which laws were important enough to merit fee shifting to prevailing parties in federal litigation. *Id.* at 269. In response to that decision, Congress enacted the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988, and indicated, as clearly as a legislative history can, that the purpose of the new law was to encourage meritorious civil rights litigation, which often results in a non-monetary award, by allowing prevailing plaintiffs to obtain an award of fees almost as a matter of course. *See*, H.R.Rep. No. 1558, 94th Cong., 2d Sess. at 6-7 (1976); S.Rep. No. 1011, 94th Cong., 2d Sess. at 4-5 (1976), *reprinted in* U.S.Code Cong. & Admin.News (1976), at 5908-13. There is no comparable legislative history for ERISA nor similar responsive action by Congress.

CONCLUSION

For all of the foregoing reasons, the Petition should be denied.

Respectfully submitted,

EDWARD G. MARKS
BECKMAN, WEIL, SHEPARDSON & FALLER
1200 Mercantile Center
120 East Fourth Street
Cincinnati, Ohio 45202

Counsel of Record for Respondent Community Mutual Insurance Company

FRANK C. WOODSIDE, III
Counsel of Record
JOHN E. SCHLOSSER
FREDERICK M. ERNY
DINSMORE & SHOHL
1900 Chemed Center
255 East Fifth Street
Cincinnati, Ohio 45202

Counsel for Respondents Children's Hospital Medical Center and The Children's Hospital Medical Center Blue Cross, Blue Shield, and Major Medical Plan for Regular Full-Time and Part-Time Employees